U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Tampa (MIA) Date: MAR 16 2001

IN RE: Applicant: [redacted]

APPLICATION: Application to Preserve Residence for Naturalization Purposes under § 316(b) of the Immigration and Nationality Act, 8 U.S.C. 1427

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

Robert P. Wiemann, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the District Director, Miami, Florida, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti who seeks to preserve her residence for naturalization purposes under § 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1427(b), as a lawful permanent resident who will be absent from the United States for the purpose of business for the Eastman Kodak Company. The record reflects that the applicant was lawfully admitted for permanent residence on May 16, 1970. She departed from the United States in 1978 and returned to Haiti to work at the American Consulate. In January 1988, the applicant filed Form I-407 on which she voluntarily abandoned her status as a lawful permanent resident.

The district director concluded that the record was devoid of evidence that the applicant was a lawful permanent resident and therefore ineligible to preserve residence for naturalization purposes. The district director then denied the application accordingly.

On appeal, the applicant submitted a copy of her passport which indicates that she had been issued a nonimmigrant visitor's visa in October 1996 and had been admitted to the United States as a nonimmigrant visitor on August 17, 1997. The applicant states that she received an SB-1 (returning resident) visa on July 22, 1999 and her passport shows that she was admitted to the United States on August 1, 1999 at Miami as an SB-1 returning resident. The record also reflects that she departed the United States after that date and was admitted again on July 1, 2000 at Miami by presenting an alien resident card or lieu document. According to the applicant she has never received her Form I-551 Alien Registration Card following her August 1999 admission and processing. The record fails to contain evidence of the SB-1 immigrant visa to show how her status went from nonimmigrant visitor in 1996 to a returning resident in 1999 after she had abandoned her status as a lawful permanent resident in 1978.

On appeal, the applicant submitted a statement from the Personnel Supervisor at the American Embassy in Port-au-Prince, Haiti stating that the applicant is an employee of the American Embassy and started to work there in March 1975.

Section 316 of the Act provides that:

> (b) Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the application for naturalization, or during the period between the date of filing the application and the date of any hearing under § 336(a) of the Act, shall break the

continuity of such residence, unless the applicant shall establish to the satisfaction of the Attorney General that he did not in fact abandon his residence in the United States during such period.

Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the application for naturalization) shall break the continuity of such residence except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter, is employed by or under contract with the Government of the United States or an American institution of research recognized as such be the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 % of whose stock is owned by an American firm or corporation, or employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of such residence if--

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the Attorney General that his absence from the United States for such period has been for such purpose.

Matter of Copeland, 19 I&N Dec. 788 (Comm. 1988), held that any departure of an alien from the United States precludes establishment of an uninterrupted period of 1 year after lawful admission for permanent residence. Matter of Graves, 19 I&N Dec. 337 (Comm. 1985), followed. In Graves, it was held that the uninterrupted physical presence requirement of § 316(b) of the Act may not be construed to allow departures from the United States. INS v. Phinpathya, 464 U.S. 183 (1984), followed; INTERP. 316.1(c)(3) overruled. Matter of Graves, also held that the effect of Rosenberg v. Fleuti, 374 U.S. 449 (1963), cannot be extended to statutory schemes which include a requirement of uninterrupted or continuous physical presence.

When Congress amended § 244(b) of the Act, 8 U.S.C. 1254(b), relating to the suspension of deportation of certain aliens with § 315(b)(3) of the Immigration Reform and Control Act of 1986, they did not include § 316(b) of the Act in those amendments. There is no evidence that it was the intent of Congress to include section 316(b) in this provision. Therefore, in light of the Supreme Court's strict literal interpretation of INS v. Phinpathya, supra, the Service is bound to follow the plain language of § 316(b) of the Act.

It was held in Graves that any departure from the United States for any reason or period of time bars a finding that an alien has been continuously physically present in the United States or present in the United States for an uninterrupted period of one year after admission.

The applicant was admitted to the United States as a returning resident in August 1999, prior to that date she had abandoned her status as a lawful permanent resident in 1988 and had been classified as a nonimmigrant for visa issuing purposes in 1996. Therefore, her departure following her admission as a resident alien in August 1999 precludes her establishment of an uninterrupted period of one year after lawful admission for permanent residence. Consequently, the applicant does not qualify for the benefits of § 316(b) of the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.